IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

WEDNESDAY, THE FIFTEENTH DAY OF JUNE
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE MR JUSTICE V.V.S.RAO

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WRIT PETITION NO.16621 of 2004

Between:

1 Small Hydro Power Developers Asso. 6-3-347/17/5, Dwarakapuri

Colony, Punjagutta, Hyderabad.
2 K.M.Power Pvt. Ltd., 6-3-883/3, 1st floor, R.K.Plaza, Punjagutta,

Hyderabad.
3 PMC Power Pvt. Ltd., 10-3-152/B, 203 East Maredpally, Secunderabad.
4 Manihamsa Power Projects Ltd., classic Krishna Residing 7-1-414/45,

Flat No.201 Srinivasa Nagar Colony,(East), S.R.Nagar, Hyderabad.
5 Bhavani Hydro Power projects Pvt. Ltd., 6-3-347/17/5, Dwarakapuri

Colony, punjagutta, Hyderabad.
6 Janapadu Hydro Power Projects Pvt. Ltd., 10th KM, N.H.5,

Chowdavaram, Guntur.
7 Kallam Spinning Mills Ltd., 10th KM, N.H.5, Chowdavaram, Guntur.
8 NCL Energy Ltd, 807, 8th floor, Raghava Ratna Towers, Chirag Ali Lane,

Hyderabad.
9 Fivess Power projects Pvt. Ltd., 8-3-219/18, Ground floor, Srinivasa

Colony (West), Ameerpet, Hyderabad.
10 Srinivasa power Pvt. Ltd., plot 9A, Gayatrinagar, Ameerpet, Hyderabad.

..... PETITIONERS

AND

1 Andhra Pradesh Electricity Regulatory Commissioner, Singareni

Bhavan, Red Hills, Hyderabad.
2 Transmission Corporation of Andhra Pradesh Ltd., Vidyut soudha,

Hyderabad.
3 Union of India, rep.by its Secretary, Ministry of Power, Govt. of India,

New Delhi.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue an appropriate writ, order or direction, more particularly one in the nature of mandamus and/or declaration:-

a) declaring that the proceedings initiated and undertaken by the 1st respondent commissioner in RP No.84/2003 in O.P.1075/2000 as without jurisdiction, contrary to law, arbitrary irrational, unreasonable and violative of the principles of natural justice and consequently to set aside the order dated 20-3-2004 as amended by the other dated 7-7-2004 in R.P.No.5/2004, and/or

b) declaring that the order dated 20-3-2004 passed by the second respondent commission in RP No.84/2003 in O.P.1075/ 2000 as modified by the order dated 7-7-2004 in R.P.5/2004 as being irrational, unreasonable, contrary to the provisions of the Electricity Act 2003, ultra vires of the powers and functions vested in the commission by the Electricity Act 2003, and to set aside the same; and

c) directing the 2nd respondent to pay for the electricity purchased by it from the small hydro power generating companies during the year 2004-2005 or any part thereof at the rate of Rs.3.65 per unit in accordance with the MNES guidelines of Rs.2.25 per unit with 1994-95 as the base year and with 5% cumulative increase for each subsequent year till arrangements are made for the purchase of electricity generated by distribution licencees at the said same rates and till determination of a proper tariff of the generating companies for sale to distribution licensees in accordance with law; and

d) declaring the inaction of the Central Government in not establishing or constituting the Appellate Tribunal for Electricity as required by section 110 of the Electricity Act 2003 as contrary to law and consequently directing the Central Government to forthwith appoint the chairperson and Members and constitute the Appellate Tribunal for Electricity, and

e) and / or pass such further or other orders as this Honourable Court may deem fit and proper so that justice may be done.

Counsel for the Petitioners: MR.KATRAGADDA GOPAL CHOUDARY

Counsel for the Respondent No.1: MR.T.ANANTA BABU, SENIOR COUNSEL/SMT.M.VINOBHA DEVI

Counsel for the Respondent No.2: MR.P.V.RAGHU RAM

Counsel for the Respondent No.3: SRI A.RAJASEKHAR REDDY, (ASSISTANT SOLICITOR GENERAL)

The Court made the following:

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ORDER:

The writ petition is filed impugning the order in R.P.No.84 of 2003 in O.P.No.1075 of 2000 dated 20.3.2004 passed by the first respondent as well as the consequential order dated 07.7.2004 passed by it. Initially this Court passed an interim order in favour of the petitioner. On an application moved by the second respondent, with the consent of the rival parties, the matter is being disposed of at the interlocutory stage.

In view of the order proposed detailed summation of the factual background, the rival case of the respondents and elaborate submissions made by the Counsel may not be necessary. In a nutshell the admitted case is as follows. The petitioner is Independent Power Producer (IPP) having entered into a Power Purchase Agreement (PPA). Under the agreement, the entire electricity produced by the petitioner by non-conventional method/conventional method is purchased by the second respondent at an agreed tariff or the tariff as fixed by the first respondent in accordance with the provisions of the Electricity Act 2003 (hereafter called 'the Act'). Initially, when the issue of tariff was not decided by the first respondent the second respondent agreed to purchase the electricity from the petitioner at Rs.2.25 (base year 1994-'95), which is enhanced at the rate of 5% every year. Before the matter was taken up by first respondent, the petitioner was selling electricity at the rate of Rs.3.48 to the second respondent. In the year 2004, the first respondent initiated *suo motu* proceedings for determination of tariff applicable to non-conventional energy projects in A.P. to be effective from 01.4.2004. After an elaborate exercise; presumably – the first respondent passed general order on 20.3.2004 in R.P.No.84 of 2003 in O.P.No.1075 of 2000 fixing the tariff (fixed cost and variable cost) at Rs.2.74 for the IPPs using bagasse as fuel, at Rs.2.88 for the IPPs using biomass as fuel and at Rs.2.34 for mini hydel projects.

The petitioners which are IPPs commenced in March, 2004 had a remedy by way of filing an appeal before the Appellate Tribunal for Electricity constituted under Section 113(2) of the Act. Nonetheless, as such Tribunal was not constituted in 2004, the petitioners filed a writ petition, in effect; challenging the general order of the first respondent. This Court disposed of the writ petition giving liberty to the petitioners to file a review petition before APERC under Section 94(1)(f) of the Act. On moving such review petition before APERC, the consequential order was passed confirming the general order dated 20.3.2004. These two orders are again challenged before this Court in this petition. This Court while admitting the writ petition passed the following order.

> Pending further orders, it is open to the Transmission corporation to implement the revised Tariff. However, in addition to the rates payable under the Revised Tariff, the petitioners shall also be paid 50 per cent of the differential amount between the old and revised tariff for the actual power supplied by them with effect from today. The additional amounts so paid shall be subject to further orders in the writ petition.

It is also made clear that 50 per cent of the differential amount shall be worked out as per the rates applicable to the respective categories of non-conventional energy power projects.

When the matter was heard, the learned Senior Counsel, Sri T.Anantha Babu, appearing for the second respondent as well as the Senior Central Government Standing Counsel, Sri A. Rajasekhar Reddy, brought to the notice of this Court that the third respondent by notification dated 07.4.2004 established the Appellate Tribunal for Electricity and that by other notifications (four of them) dated 18.5.2005 the Chairperson, Judicial member and two technical members were duly appointed for a period of three years from 13.5.2005 FN. Therefore they would urge that the writ petition is liable to be dismissed in view of availability of effective efficacious alternative remedy. The learned Central Government Standing Counsel also submits that within a period of three months, the appellate Tribunal would become fully functional and the matters can as well be decided by the said Tribunal. The learned Counsel does not seriously oppose the same.

Before the general order of the first respondent came to be passed, the petitioners commenced their production and supplied electricity to the second respondent. There was always a legitimate expectation that the tariff payable by the second respondent to IPP would be as was fixed when the production commenced. This Court considering this matter directed the second respondent to implement the revised tariff and also pay 50% of the differential amount between the old and revised tariff. This order of this Court is being worked to the benefit of IPP as well as the second respondent. Even if the petitioners approach learned appellate Tribunal for electricity and moves application to obtain appropriate interim order, it would certainly take some time. Therefore while relegating the petitioners to duly constituted statutory appellate Tribunal, it would be proper in equity to continue the same arrangement for a period of eight weeks. This is with a hope that the Central Government would do everything in its power to make learned appellate Tribunal for electricity fully functional as expeditiously as possible preferably not later than a period of two months from today.

In view of the above, the petitioners are given liberty to approach the Appellate Tribunal for Electricity, New Delhi within a period of two weeks from today and move appropriate application for interim orders, if so advised. To enable the petitioners to obtain appropriate interim orders from the learned appellate Tribunal, the arrangement for payment of tariff as ordered by this Court on 20.8.2004 shall remain in force for a period of eight weeks from today or till the Tribunal passes orders on the interim application, whichever is earlier.

The writ petition, with the above observations and directions, is disposed of, without any order as to costs.

June 15, 2005. (**V.V.S.RAO,J**)

NOTE:

Issue copy of the order

by 20.6.2005.

(B/o)

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To

1 The Chairman, The Andhra Pradesh Electricity Regulatory

Commission, Red Hills, Hyderabad.
2 The Chairman cum Managing Director, The Andhra Pradesh

Transmission Company, Ltd. Vidyut Soudha, Somajiguda,

Hyderabad.
3 The Secretary, Union of India, Ministry of Energy,

Central Secretariat Buildings, New Delhi - 1.

4 The Appellate Tribunal for Electricity, New Delhi.

5 Two CD Copies.